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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

VINCENT PACELLI, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vincent Pacelli respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered in this case on November 30, 1972, by the Second Circuit Court of Appeals. Petitioner was convicted in the United States District Court for the Southern District of New York on February 15, 1972, after trial (Hon. Milton Pollack and a jury), convicting him of violating Sections 812, 841 and 846 of Title 21 of the United States Code and sentencing him to a total of 20 years' imprisonment and a $10,000 fine.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit are not yet reported and are printed as Appendix A hereto. There was no opinion of the District Court.

JURISDICTION

The opinion of the Second Circuit was rendered on November 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a criminal defendant is denied due process of law under the Fifth Amendment by the admission into evidence against him of an out-of-court statement by an alleged co-conspirator, where:

(a) the statement was not made under oath;

(b) the statement did not purport to reflect the co-conspirator's own words but only a "summary" of what she said;

(c) the statement was taken immediately following the arrest of the co-conspirator, during police interrogation at narcotics headquarters, while she was under custodial control;

(d) the co-conspirator swore at trial that she never made the statement attributed to her, and that the only document she signed, without reading, was what she took to be a deportation document;

(e) the co-conspirator swore at trial that the statement was untrue and that the defendant had had no connection with her admitted narcotics business, and

(f) the statement provided crucial and incriminating evidence against the defendant.

2. Whether the presence in the record of other evidence against the defendant justifies the affirmance of a conviction in a federal court where an out-of-court statement is used against the defendant in the circumstances described in Question 1, above.

3. (a) Whether a criminal defendant's rights under the Fourth Amendment were violated by the introduction and use against him of a 12-ounce bottle of boric acid (a common disinfectant available at any drug store without prescription), which was taken from his apartment under a post-arrest warrant authorizing the seizure of ½ kilogram of heroin.

(b) Whether such a bottle of boric acid was either "an instrumentality of the crime alleged" or seizable under the so-called "plain view" doctrine.

(c) Even if it was an "instrumentality", whether it could be seized under such a warrant, when the seizure was not made incident to an arrest, in hot pursuit, or under any other recognized exception to the constitutional mandate against unreasonable searches and seizures.

(d) Whether the boric acid should have been suppressed because it was seized during a general search, was but one of a large number of indiscriminate seizures, and clearly was not authorized by the warrant under which it was ostensibly made.

CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

Petitioner Vincent Pacelli was indicted for conspiring to violate, and for violating, 21 U.S.C. §§ 812 and 841, and for using a telephone to facilitate the commission of a felony.

Undercover Narcotics Agent John B. Lepore testified at Petitioner's trial that on May 3, 1971, he went to an informant's apartment and picked up two packages of cocaine which the informant said he had received from one Elisa Possas for delivery to Lepore. Possas testified, freely admitting that she had delivered cocaine to the informer on this date. She repeatedly swore that her one and only source for drugs was a man named Lorenzo Cancio (JA 301, 303, 317, 326, 354, 385-387, 393[1]).

Agent Lepore recounted how he next met Possas on May 5, paid her for the cocaine, received a new sample from her, and waited while she left to obtain some "dynamite" cocaine. She returned with the dynamite cocaine, which she agreed to sell for $8,000. According to the agent, she identified her source as Cancio. At this same time, the agent asked her whether she had any excess heroin, and, according to him, she said

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[1] "JA" refers to the Joint Appendix filed by both parties in the Court of Appeals. A certified copy of the Joint Appendix has been filed with the Clerk of this Court.

her source for heroin was her boyfriend Jimmy "Pappas" (whose formal name was Papadakos).

As to this date, May 5, Possas freely admitted having delivered cocaine to the agent. She denied, however, that she had discussed Pappas (JA 353-354). Instead, she said her sole source was Cancio, who had met her and given her the cocaine (JA 301-302). Possas testified that by May 5 she herself had been on cocaine for a week and that in addition she was taking marijuana, Librium and Valium (JA 375, 387, 390). (Agent Lepore conceded that he knew Possas "snorted" cocaine; see JA 103.) Possas said she was upset because her boyfriend, Pappas, had been going out with other girls along with a friend of his, Petitioner Pacelli (JA 375-376, 378, 380). On one occasion she had tried to kill herself because of her boyfriend's conduct (JA 384).

Agent Lepore testified that the next day, May 6, he paid Possas $8,000 for the previous day's cocaine, and she again discussed heroin and Pappas, her boyfriend. Cancio swore that on this day Possas paid him part of what she owed him for cocaine.

Two weeks later, on May 20, Possas showed Agent Lepore heroin for the first time, according to his testimony, and they agreed on a price. According to the agent, Possas discussed the possibility of becoming partners with him in the drug business. She also told him for the first time (see JA 102) that her source for heroin was "Vinnie the Italian", who was to be married on June 6 to a friend of hers, Beverly Jalaba (*ibid.*). She did not know Vinnie's name, but it was on a wedding invitation in her apartment. Agent Lepore testified that Possas dialed a number later

identified as that of Beverly Jalaba (see JA 559), hung up, dialed again, and told "Vinnie" that "my man will take the half" (JA 80-81). Later in the afternoon, the agent said he called Possas at her apartment, and she identified Vinnie as Vincent Pacelli, Jr. (Petitioner) after looking at her wedding invitation (JA 82).

Agent Lepore said that that same evening, he picked up Possas and told her that the heroin she had given him was extremely poor and that they should give it back to Vinnie. She declined, saying Vinnie would not meet strangers. Armed agents closed in and arrested Possas and, ostensibly, Agent Lepore.

Possas was taken to the sixth floor of Narcotics Headquarters. After about 20 minutes, Agent Lepore, now identified as an agent, saw her and told her that if she cooperated, this would be made known to the court (JA 83, 115-116, 414, 532-533). According to Lepore and two other agents who testified, Possas signed a form entitled "Statement of Rights and Waiver" at 11:30 p.m.[2] An agent, Thomas Devine, conceded that at this time Possas was crying and upset (JA 412)—a fact confirmed in part by another agent (JA 270). Agent Devine also conceded that he was aware Possas was from Brazil and that deportation *was* discussed with her (JA 413-414).

According to the agents, Possas then told what she knew about narcotics, and Agent Devine attempted to take down a statement on the typewriter. However, since Agent Devine was a "slow typist" and Possas was speaking quickly, what she said could not be taken

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[2] JA 266, 399-400, 439. This "Statement of Rights and Waiver", Govt. Ex. 9, has been reproduced as Appendix B to this Petition.

down word-for-word (JA 408). Instead, as Agent Devine repeatedly testified, he only attempted to "summarize" what she said (JA 402); these were not "verbatim the words she used" (JA 416). After he typed the statement, Agent Devine read it back and asked her "if that was the substance" (JA 402). He claimed that she read it and made several changes, which she initialed (JA 402-403, 437-440). She then signed the statement, and Agents Devine and E. James King, the only two agents present at the time, also signed (JA 402, 406, 435, 437, 440, 445[3]). Although recording equipment was available, her statement was not recorded, nor was she asked to write the statement in her own handwriting (JA 415, 426-427), although she read English very well (JA 357).

Possas, who had never before been arrested (JA 537), testified that at this time she was upset, shaking, crying, afraid and scared (JA 357-358, 380-382, 384). She was handcuffed (JA 356). She had taken cocaine and Librium earlier, and she now took 25 milligrams of Librium with the permission of the agents (JA 357, 381). (The agents did not deny this; see JA 419, 429-430.)

She swore the agents promised her that if she would sign what they had written, they would get her back to Brazil, where she was from, under an American flag "without no troubles at all" (JA 357, 382-383). She said she stayed with the agents 12 hours, she was never fed, she never slept, and during this time she told them "crazy and wild" things (JA 358, 382). "[T]hey scared me so much, so many men" (JA 380-381); "I

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[3] Her alleged statement, Govt. Ex. 9A, has been reproduced as Appendix C to this Petition.

almost want to kill myself" (JA 384). She admitted signing some documents, but she thought she was signing deportation papers (JA 382-383). She flatly denied that she told the agents what was in her "statement", Govt. Ex. 9A (JA 308, 309), even though she may have answered a few questions admitting her connection with narcotics (JA 360-362). She never read the statement, nor was it read to her, before she signed it (JA 309-310, 311, 357, 362-363). She signed it while sick, under the influence of cocaine, and under the pressure of threats (JA 305-3-7, 312, 320, 376-378), and as she now read it, it was "a bunch of lies" (JA 308). The agents even told her where and what changes to make in the statement and where to put her initials (JA 363-367, 383-384, 427). She was told she could not have a lawyer (JA 311).

At trial she freely admitted having lived with Pappas, knowing Jalaba for some time, being invited to the Jalaba wedding, delivering cocaine to the informer on May 3, giving heroin to Agent Lepore on May 5, possessing heroin on May 20, and delivering heroin to Agent Lepore on May 21. But she flatly, unequivocally, and repeatedly denied receiving drugs from Petitioner; her one and only source of drugs had been Cancio (JA 297-298, 301-304, 316-318, 324, 327, 354, 385-387, 393). As a matter of fact, she did not even know Petitioner personally, had never spoken to him, and remembered his name only from the Jalaba wedding invitation and as a friend of Pappas who reportedly had gone out with him and other girls on occasion (JA 286, 318-319, 325-326, 347, 350, 376, 380). She did not recognize Petitioner in the courtroom (JA 287). She conceded having pleaded guilty of conspiring with Petitioner and Pappas in this case but

said that in fact they had had nothing to do with her narcotics activities and that the only person she had conspired with was Cancio (JA 287, 303-305, 327-328).

The Government claimed surprise at Possas' testimony, although it contemporaneously submitted an eight-page memorandum citing 12 cases and arguing that her statement should be admitted into evidence despite her testimony (JA 329-344). (The court denied a defense request for a hearing on the issue of surprise; JA 345.) The Government made clear that it was offering Possas' statement, Govt. Ex. 9A, not only on the issue of credibility *but for its substance as well* (JA 331-332). Over strenuous objection from Petitioner's attorney (JA 329-344, 405), the statement was received and read to the jury after Possas left the stand (JA 405). Both in the court's instructions (JA 618-619, 631-632) and in the prosecutor's summation,[4] it was made clear that even though Possas denied hav-

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[4] *E.g.*, "Miss Possas has to somehow explain away this early statement, if she is going to give her testimony here in court. She has to explain away Government Exhibit 9-A in evidence, because this statement lays out every detail of the transactions and it was witnessed by Devine and King, and you heard them say that it was taken under relaxed circumstances, when they were having sandwiches and coffee and milk shakes, and Miss Possas wasn't hopped up on drugs, as she said.

"This statement, the government submits to you, is the truth but Miss Possas has to explain it away, somehow" (JA 604-605).

"Now, clearly, you may find * * * that this statement is the truth in this case, and I urge you to request this exhibit, as you may request any of the exhibits in this case, and also have any of the evidence read back. I urge you to request this exhibit and take it into the jury room with you because this statement alone could convict these two defendants" (JA 607-608).

"Now the truth in this case becomes evident, that it was the agents, and the earlier statements of Miss Possas that are to be relied upon here" (JA 610).

ing made the statement, the statement was being offered and could be used by the jury for the truth of its contents. As the statement reveals on its face (see Appendix C), it strongly implicated Petitioner.

According to Agent Devine, after Possas made her "statement", she was taken to her apartment (about 3 a.m.), where the wedding invitation was found. Early in the morning, agents went to Beverly Jalaba's apartment house—without a warrant of any kind. One agent stood in the street and watched the 27th floor where her apartment was located. Other agents went to her apartment, knocked on the door, and said they were there to arrest Petitioner. According to an agent, there was the sound of venetian blinds and a window opening, and then the door was opened from the inside, revealing a man and a woman (Petitioner and Jalaba) who were not dressed.[5] Petitioner was

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[5] The Court of Appeals referred to the sound of a toilet flushing. The record shows that the agent, upon prompting, testified:

"Q. While you were waiting outside for the door to open, was it possible that half kilo of heroin was flushed down the toilet.

"MR. ROSNER [Petitioner's attorney]: Objection, your Honor.

"THE COURT: Sustained.

"Q. Did you hear a toilet flush while you were outside in the hallway.

"MR. ROSNER: Objection, your Honor.

"THE COURT: Sustained as to form.

"Q. Did you hear anything while you were waiting outside in the hall?

"MR. ROSNER: Objection. Asked and answered.

"THE COURT: Overruled.

"Q. You may answer.

"A. Yes sir. I heard a venetian blind rattle, heard what appeared to be a window open. I also heard a toilet flush" (JA 522-523).

(Continued on next page)

placed under arrest (JA 470). When Petitioner asked if the agents had a search warrant, he was told they did not (JA 471). Appellant was warned of his rights but *not* of his right to the *presence* of an attorney (JA 472, 505). In the meantime, the agent on the street claimed he saw a white bag thrown out of a window and land on a carport roof below. He could not see who threw it (JA 463), and although he claimed to identify the window as Jalaba's, photographic evidence introduced by Petitioner put this claim in serious doubt (JA 459-463, 579-589; Def. Ex. E, J). The agent retrieved the bag and went to Jalaba's apartment, and Jalaba was placed under arrest. The bag, which contained cocaine, not heroin, was never tested for fingerprints (JA 514).

At 1 p.m.—after the arrest of Petitioner and Jalaba and after the agents had left Jalaba's apartment—one agent obtained a search warrant which was quite specific: it authorized a search of this particular apartment for ½ kilo of heroin (JA 479, 516-517; Def. Ex. F). The application for the warrant revealed that it was based upon Possas' statement to the agents after her arrest that ½ kilo of heroin could be found in this apartment (JA 518). The apartment was thoroughly searched by a number of agents, and no narcotics were found (JA 517-519). As many as 26 items were seized, such as clothing, suitcases and barbells,[6] but only one

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Not only was the reference to the toilet flushing virtually put in the witness's mouth, but he never mentioned it for 44 pages of testimony—nowhere in his direct or cross-examination and not until his redirect examination. Following the exchange quoted above, the incident was never referred to again.

[6] JA 479-480; Govt. Ex. 13C-G, 14C-F, 15D, 16D, 17C-I, 18C-J, all for identification.

item was introduced as part of the Government's case as an "instrumentality of crime" (JA 559). This was a 12-ounce bottle of boric acid, which the Government's own witnesses conceded was a common household disinfectant available without prescription at any drug store (Govt. Ex. 15D; JA 520-521, 556, 558, 560-562, 566, 568). It was introduced on the theory that boric acid was "the prime diluent for the drug cocaine" (JA 563; see also JA 487, 519).[7]

Under count 1, which charged a conspiracy between Petitioner, Papadakos, Jalaba and Possas between January 1 and June 14, 1971, Possas pleaded guilty and testified for the Government; the count was dismissed as to Jalaba, and Petitioner and Papadakos were found guilty.

Under count 2, which charged that Possas and Petitioner distributed cocaine on May 3, 1971, Possas pleaded guilty and Petitioner was found *not guilty.*

Under count 3, which charged that between May 10 and May 20, 1971, Petitioner, Possas and Papadakos distributed heroin, Possas pleaded guilty, Papadakos was found *not guilty,* and Petitioner was found guilty.

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[7] The agent who seized the one bottle claimed that there were "say 30 to 40 tins of boric acid, similar to this—labelled boric acid"—in a shopping bag in Jalaba's apartment (JA 485; see also JA 519). However, he did not seize these tins (JA 519-520), even though the police themselves admitted it would have been good police practice to do so (JA 565). He did not even photograph them (JA 520) or show them to some other agent. Despite these facts, the prosecutor in his summation relied not only on the one bottle introduced in evidence but on "the 30 to 40 tins of boric acid" also allegedly found in the apartment (Tr. 610, 611, 612, 631), and the Court of Appeals treated the issue as if all 30 to 40 tins had been seized and introduced.

Under count 4, which charged that Jalaba and Petitioner possessed cocaine with intent to distribute on May 21, 1971, the count was *dismissed* as to Jalaba and Petitioner was found guilty.

Finally, under count 5, which charged that Possas and Petitioner knowingly used the telephone on May 20, 1971, to facilitate the commission of a felony (namely, the same act charged in count 3), Possas pleaded guilty, and Petitioner was found guilty.

The Court of Appeals affirmed. It held that the admission of Possas' statement did not violate due process, and that although it was error to have admitted it for the truth of its contents, the error was "harmless" in view of (a) Agent Lepore's testimony as to what Possas had told him, (b) the telephone call between Possas and "Vinnie", and (c) the cocaine "found in Jalaba's apartment".[8] The court also held that the bottle of boric acid, whether viewed as incriminating or mere evidence, was admissible under the "plain-view" doctrine of *Coolidge* v. *New Hampshire,* 403 U.S. 43 (1971).

REASONS FOR GRANTING THE WRIT

I. The Possas Statement

We respectfully submit that the admission of Possas' alleged statement for the truth of its contents violated (a) Petitioner's right to due process of law under the Fifth Amendment and (b) the hearsay rule of evidence in effect in the federal courts. For here, Petitioner was convicted by means of an unsworn

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[8] Since no drugs were found in Jalaba's apartment, we assume the court was referring to the bag which the agent on the street allegedly saw dropped from her 27th floor window.

statement which even the police conceded was not in the witness' own words, which was taken during police interrogation, and which the witness herself denied under oath ever having made.

The use of such a statement was not only unconstitutional but unprecedented. The case goes as far as any we are aware of in allowing a defendant in a federal court to be convicted on the basis of a totally repudiated but highly incriminating document which even the Court of Appeals conceded was inadmissible for the purpose for which it was used.

We recognize, of course, the more recent view of this Court that a prior statement can be admitted into evidence, so long as the person who made the statement is available for cross-examination, without violating the Confrontation Clause of the Sixth Amendment. That is why we did not urge a Sixth Amendment violation before the Court of Appeals. But to carry this Court's recent decisions to the extreme allowed in the instant case is not only a perversion of those rulings[9]

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[9] In *California* v. *Green*, 399 U.S. 149 (1970), the Court did not even imply that it would be constitutional, much less the better rule, to allow the admission of an unsworn statement which was made by an accused just subsequent to his arrest, which did not purport to be his own words, and which he denied making and totally repudiated at trial. By emphasizing that the Confrontation Clause does not require excluding the prior statements of a witness "who concedes making the statements" (*id.* at 164), the Court implied that where no such concession is made, the constitutional problem is very real. And by casting doubt on whether the statement made to the police officer in *Green* was constitutionally admissible even though the witness admitted making it (*id.* at 168-170), the Court pointed the way to the proper result here.

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), an opinion for four Justices held that the hearsay rule applicable in the federal courts *—which would have excluded the out-of-court statement in that case*

but an extremely dangerous step backward in the proper administration of criminal justice. For the fact is that if a statement such as the one allegedly made by Possas can be used in a criminal trial for the truth of its contents without a reversal of the conviction, there is literally nothing left of the traditional concept that a defendant can only be convicted on the basis of sworn testimony.

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as well as in the instant one (*id.* at 79, 81)—was not identical with the requirements of the Confrontation Clause. Since, among other things, the particular statement at issue was not crucial (*id.* at 87), it was not made "in the coercive atmosphere of official interrogation" (*ibid.*), it did not involve prosecutorial negligence (*ibid.*), it contained no express assertion about past fact (*id.* at 88), and the speaker had no apparent reason to lie (*id.* at 89), the admission of the statement was not unconstitutional. All of these elements, of course, are present in the instant case.

Nelson v. *O'Neil*, 402 U.S. (1971), involving only a constitutional question, amounted to no more than the traditional one of a confession being admissible against the co-defendant who made it but not against the co-defendant who did not.

Many courts citing *California* v. *Green* have said that that decision has no effect on the federal co-conspirator hearsay exception. *See, e.g., United States* v. *Cerone*, 452 F.2d 274 (7th Cir. 1971); *United States* v. *Addonizio*, 451 F.2d (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Clayton*, 450 F.2d 16 (1st Cir. 1971), *cert. denied*, 405 U.S. 975 (1972); *United States* v. *Gower*, 447 F.2d 187 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *United States* v. *Adams*, 446 F.2d 681 (9th Cir.), *cert. denied*, 404 U.S. 943 (1971); *United States* v. *American Radiator & Standard Sanitary Corp*, 433 F.2d 174 (3rd Cir.), *cert. denied*, 401 U.S. 948 (1970). Under that exception the hearsay declarations of a co-conspirator may be admitted against an accomplice so long as the statements were made in furtherance of the conspiracy. However, as Mr. Justice Harlan noted in his concurring opinion in *Dutton* (400 U.S. at 98), *no such statement is admissible under this exception if the declarant was in custody at the time it was uttered.* Furthermore, no Circuit Court has held that *Green*, *Dutton* or *Nelson* allows the admission of a witness' prior inconsistent post-arrest statement as substantive evidence against a defendant.

We look first at the circumstances surrounding the "taking" of the statement, then at Possas' repudiation of it at trial, and finally at the key part the statement played in the conviction.

(a) Circumstances surrounding the statement.

As shown in the Statement of the Case, even assuming that Possas' incriminating statement was in fact taken from her—which she denied—it was taken under the most harrowing and untrustworthy of circumstances. Possas, who had never before been arrested, was suddenly taken into custody by a group of agents about 11:00 o'clock at night. She was handcuffed and transported to Narcotics Headquarters. Within 20 minutes of her arrest she was confronted by an undercover agent to whom she had been selling cocaine and heroin for some two weeks. Her condition was distraught—as at least partially confirmed by two of the agents. She was admittedly a cocaine "snorter" and by her own account a taker of many pills. The agents not only told her that her cooperation would be brought to the attention of the court but also discussed deportation back to her native Brazil, as one of them admitted. Pressed to name her sources, whom did she name? According to the statement, she never mentioned Cancio, who testified on the stand that he supplied her with drugs, but only her boyfriend (Pappas) and Petitioner. Yet she admitted at trial that she was furious at Pappas for going out with Petitioner and other girls. The incentive and motive for lying are obvious.

Under these circumstances, was every possible precaution taken by the police to make certain that any statement taken from Possas would be accurate, au-

thentic and not subject to attack? On the contrary, although recording equipment was admittedly available, it was not used to record her statement. She was not asked to write the statement in her own handwriting, although her English was excellent. The statement was not taken down by a stenographer and transcribed verbatim; her thoughts were merely "summarized" on the typewriter by a man who was at one and the same time a poor typist and the agent principally responsible for arresting her. Her statement was not notarized or otherwise sworn to; she simply signed it, supposedly witnessed by two of the arresting agents.

Thus, even if we put to one side Possas' testimony at trial, we find a statement which not only fails to bear the marks of reliability but which demonstrably is unreliable and untrustworthy.

(b) Possas' repudiation of the statement

When Possas took the stand at trial, she did not admit making the statement and then claim that it was false or that she did not remember the facts. Instead, she *denied* making the statement and *also* claimed that it was false. She said that in her distraught state she might have said some wild things to the agents and may even have answered some questions about her narcotics connections, but she did *not* tell the agents what was in the statement. She signed the statement thinking it was a deportation document. She was induced to do so by threats and fear. She was told to make certain changes in the statement and to initial them, and she complied, but not because the statement was hers. She claimed not to have read it or to have had it read to her.

In addition, she testified that the statement was false, that she dealt in narcotics with Cancio as her sole source, and that Pappas and Petitioner had nothing to do with her narcotics. The statement, in other words, was utterly repudiated by the party who had allegedly made it.

(c) Importance of the statement.

The importance of the statement to the Government's case can hardly be overstated.

It must be remembered that until Petitioner's arrest on May 21, no agent had had any direct contact with him at all. Every contact had been with Possas or an informer. Since Possas denied at trial that she even knew Petitioner, and since Cancio never mentioned Petitioner during his entire testimony, Petitioner's conviction under four of the five counts [10] depended entirely upon what the agents said Possas told them.

Her alleged statements are surrounded by contradictions, confusion and unreliability. Even Agent Lepore admitted, for example, that from May 5, when he first met Possas, until May 20, when they had developed so close a relationship that she was proposing a joint narcotics venture between them, she never men-

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[10] The remaining count should also be reversed. Since Petitioner's fingerprints were not found on the cocaine involved in this count; there was serious doubt as to whether the cocaine was thrown from Jalaba's window; no one saw Petitioner with the cocaine, and the count was dismissed as to Jalaba, this count can hardly stand analysis on its own. Moreover, the search warrant involved in this count was invalid (see Part II, *infra*), and there is no way of knowing the extent to which the jury relied upon Possas' statement to implicate Petitioner as to all counts.

tioned Petitioner at all. It was only on the afternoon of May 20 that Petitioner's name first turned up in an alleged conversation. Yet when the agent suggested that they meet with Petitioner, Possas immediately demurred.[11]

There was one real test of the truthfulness of Possas' alleged implication of Petitioner. In seeking a search warrant, Agent Lepore swore that "Possas told me that [Petitioner] has a ½ kilogram of heroin in his apartment at the present time" (JA 19). Within hours the apartment was thoroughly searched by agents, and no heroin was found. Thus, the one real test of Possas' implication of Petitioner utterly failed. When these facts are combined with the fact that none of Petitioner's fingerprints appeared on any drugs introduced in this case, including the drugs supposedly thrown from Jalaba's apartment, proof of his participation in the drug ring comes to rest almost completely upon the Possas "statement".

Certainly proof of Petitioner's participation cannot be said to rest, as the Court of Appeals assumed, upon Agent Lepore's testimony, for the jury demonstrated that it did not fully believe him. He repeatedly testi-

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[11] Moreover, the Government would have us believe that (a) Possas did not know the full name of this man who supposedly sold her drugs, but (b) she was easily able to find it by simply looking at the invitation she had received to his wedding. If Petitioner had been attempting to hide his name from Possas, she would hardly have received an invitation to his wedding, and if he was not attempting to hide his name, it is difficult to understand why she would not have remembered it, since according to the agents she was constantly dealing with him in the narcotics business.

fied (JA 81, 107, 133) that according to Possas, Petitioner and Pappas had been her source for the cocaine sold to Agent Lepore on May 3, and yet the jury found Petitioner *not guilty* under count 2, the count which charged Petitioner with making that particular sale. As for the rest of the evidence, virtually none of it involved Petitioner.

It is in the light of all these facts that Possas' incriminating statement must be judged. It is small wonder that the prosecutor relied on it time and again in his argument to the jury, not just to prove that Possas lied at trial but to prove that Petitioner was guilty (see n. 4, *supra*). In the light of the court's instructions, which allowed the jury to use the statement for the truth of its contents, there can be no question but that the verdict should be reversed if the statement was wrongfully admitted.

(d) Violation of due process and the federal rule.

In his concurring opinion in *Dutton* v. *Evans, supra,* Mr. Justice Harlan wrote (400 U.S. at 98):

> Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption. The exclusion of such evidence dates at least from Tong's Case, Kelyng 17, 18-19, 84 Eng. Rep. 1061, 1062 (K. B. 1663), and is universally accepted. This theory would be adequate to account for the results of both *Douglas* v. *Alabama,* 380 U.S. 415 (1965) and *Bruton* v. *United States,* 391 U.S. 123 (1968).

That is the rule we respectfully urge the Court to adopt and apply here.[12] It is a rule recognizing the practical realities of police control of a person who occupies the dual role of both an accused and a potential witness. If the rule were rejected, the temptation for police to obtain statements from witnesses under less than truthful circumstances would be enormous. Particularly where the witness is himself accused of crime, is distraught at being arrested, and is subject to all of the emotional stress inherent in the police interrogation process, the opportunity for abuse is too great to be ignored. Once that statement is obtained, it makes no difference to the police that the witness will repudiate it at trial; so long as the witness is produced and the requirements of the Confrontation Clause are thereby met, the statement comes in and provides the basis for conviction. We do not have to assume that the police would completely fabricate a non-existent story. It is only necessary to point out that the courts are expecting too much of the police, alone with the witness in the confines of their headquarters, to be meticulous about detailing all of the facts, nuances, qualifications, exceptions, explanations and retractions that the witness may be trying to spell out. It is for

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[12] The rule coincides with the so-called *Krulewitch* concept that in federal conspiracy trials, the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period. *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949).

reasons like these that this country has never reverted to trial-by-affidavit, much less trial-by-unsworn statement.[13]

If the rule were adopted, it would require reversal here. First, a violation of due process in the admission of a statement as incriminating as this one cannot be "harmless error", regardless of what other evidence is introduced against the defendant. Secondly, it is blinking reality to believe that the jury could be unpersuaded by the Possas statement, and there is simply no way of knowing the extent of the persuasion. As another court has said in a comparable situation, "We cannot say with fair assurance that the jury was not substantially swayed by the use of Tangney's confessions against Mora." *Mora* v. *United States,* 190 F.2d 749, 753 (5th Cir. 1951). See also *Kramer* v. *United States,* 317 F.2d 114, 117 (D.C. Cir. 1963) (and cases there cited).[14]

Finally, the evidence supporting guilt cited by the Second Circuit is meager at best. (a) As we have

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[13] This Court recorded its disapproval of the use of prior inconsistent statements as direct evidence in *Bridges* v. *Wixon,* 326 U.S. 135 (1945).

[14] The situation is comparable to that faced by this Court in *Robinson* v. *California,* 370 U.S. 660, 665 (1962), where it said:

> Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

noted, the jury itself did not accept all of Agent Lepore's testimony, and the very fact that the Government sought so diligently to bolster that testimony with the Possas pre-trial statement is mute evidence that the Government itself did not believe the agent's testimony could convict without that statement.[15] (b) The telephone call to "Vinnie", where a few words were heard from Possas' end of the line and nothing whatever was heard of the other end of the line, can hardly reach to the dignity of incriminating evidence. So far this record shows, the person on the other end of the line, whoever it was, could have replied, "What in the world are you talking about?" (c) The incident in Beverly Jalaba's apartment involved not only a questionable event in itself but a different date, a different drug, and a total absence of the drug sought by the warrant.

Even if the Court disagrees with us as to the applicability of a due process standard, we respectfully submit that since the Possas statement violated the federal hearsay rule and should never have been used for the truth of its contents[16]—as even the Second Circuit

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[15] The Government told the Court of Appeals that " • • • Possas gave testimony on direct examination which, if believed, was fatal to the Government's case • • • " (Govt. Brief at 13).

[16] This would be true whether the "orthodox" rule as to hearsay is applicable or whether the Second Circuit exception to that rule applies. See *United States* v. *Cunningham*, 446 F.2d 194 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971); *United States* v. *Briggs*, 457 F.2d 908 (2d Cir. 1972).

Recent Circuit Court decisions prior to *Green* were unanimous in upholding the orthodox rule. *E.g.*, *Byrd* v. *United States*, 342 F.2d 939 (D.C. Cir. 1965); *United States* v. *Nuccio*, *supra*; *United States* v. *Schwartz*, 390 F.2d 1 (3d Cir. 1968); *Valentine* v. *United States*, 272 F.2d 777 (5th Cir. 1959); *United States* v. *Lipscomb*,

(Continued on Page 24)

conceded—the conviction should not be allowed to stand. Not only was the other evidence cited by the Court of Appeals extremely meager, but the impact of the statement must have been enormous.

The indications to date are that the Circuits are converting this Court's rulings under the Confrontation Clause into an evidentiary rule applicable generally to hearsay in the federal courts. It is time that the distinction be clearly drawn and that the reliance on out-of-court statements, even when denied and repudiated in court, be brought under some semblance of control. This is particularly vital at a time when the new Federal Rules allow so much leeway in the use of such statements, and the danger thus increases that a proper rule in a proper case will be increasingly converted into an improper basis for criminal conviction.

II. ILLEGAL SEARCH AND SEIZURE

Subsequent to Petitioner's arrest, narcotics agents obtained a warrant to search for ½ kilogram of heroin. They conducted the search but found no heroin. They did, however, find some 26 other items, all of which

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425 F.2d 226 (6th Cir. 1970); *United States* v. *Duff*, 332 F.2d 702 (6th Cir. 1964); *United States* v. *Barnes*, 319 F.2d 290 (6th Cir. 1963); *United States* v. *Rainwater*, 283 F.2d 386 (8th Cir. 1960); *Brooks* v *United States*, 309 F.2d 580 (10th Cir. 1962).

Since *Green*, at least three federal courts have upheld the efficacy of the orthodox rule. *Doss* v. *United States*, 431 F.2d 601 (9th Cir. 1970); *United States* v. *Small*, 443 F.2d 497 (3d Cir. 1971); *United States* v. *Neal*, 452 F.2d 1085 (10th Cir. 1971). In addition, the supreme courts of Louisiana, Illinois and South Dakota have all reaffirmed their adherence to the orthodox rule *State* v. *Ray*, 249 So.2d 540, 543 (La. 1971); *State* v. *Williams*, 246 So.2d 4, 5 (La. 1971); *People* v. *Collins*, 274 N.E.2d 77, 86-87 (Ill. 1971); *State* v. *Kietzke*, 186 N.W.2d 551, 554 (S.D. 1971).

they seized. One of these items was a 12-ounce bottle of boric acid, a common household disinfectant (JA 32-33). The rest apparently consisted of clothes and miscellaneous other items from all parts of the apartment. The boric acid was later used as evidence against Petitioner, whereas the other seized items were stipulated to have been irrelevant to the case against him. At trial, an agent testified as an expert on narcotics paraphernalia that boric acid was the "prime diluent for the drug cocaine" (JA 563). Another agent testified that although he had seized only one bottle of boric acid, he had seen "30 or 40" such "tins." The agent had taken no photographs or other measures to support his assertion that the additional bottles existed.

In overruling Petitioner's motion for a new trial based on an illegal seizure under the Fourth Amendment, the trial court ruled that "instrumentalities of crime" could be seized under the authority of a search warrant even though not described in the warrant. That position will not stand analysis, but we deal with it only in a footnote,[17] since the Court of Appeals adopted a broader, "plain-view" test.

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[17] The experienced agents involved in this case could not possibly have "reasonably believed"—the test used by the trial court—that a 12-ounce bottle of boric acid was being used, or was reasonably capable of being used, as a diluent, much less as the *prime* diluent, for narcotics, or they would have seized all of the alleged 30 or more bottles.

If they were experienced and sophisticated enough to recognize a common household item as a "prime" instrumentality of narcotics crime, then they were also experienced and sophisticated enough to know that in fact boric acid is not and could not be used as such—that its toxicity makes it highly *inappropriate* as a diluent for intravenously taken narcotics. See Valdes-Dapena and Arey, *Boric Acid Poisoning*, 61 J. *Pediatrics* 531 (1962); *L. Wong*

(Continued on Page 26)

The Court of Appeals relied on *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971), which was decided one month after the search and seizure at issue in this case. We submit that the "plain view" rule as enunciated in *Coolidge* is an appropriate formulation of the law in cases where the justification for the search is

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and Others, *Boric Acid Poisoning: Report of Eleven Cases,* 90 Canad. Med. Ass. J. 1018 (1964); Krantz, Carr and LaDu, The Pharmacological Basis of Medical Practice 780 (7th ed. 1969); Goodman and Gilman, The Pharmacological Basis of Therapeutics 1041 (4th ed. 1970).

If, on the other hand, the agents are not expected to have been expert enough to know the common pharmacological properties of an everyday substance such as boric acid, surely they would be expected to have knowledge common among narcotics agents. Yet it is interesting to note that neither the Narcotic Bureau's publicly-issued fact sheets nor its three-day seminar on drug abuse even mention boric acid, the alleged "prime diluent". It is further enlightening that during 29 pages of exhaustive testimony on narcotics paraphernalia before a committee of Congress, the very agent who testified in this case that boric acid is the "prime diluent" never once mentioned boric acid as a diluent at all. *See Hearings pursuant to H. Res. 17 before the Select Committee on Crime, House of Representatives, at New York, N.Y. on June 25-30, 1970,* 91st Cong., 2nd Sess., at 9-19, 77-95.

The trial court's test for admissibility further required that the item seized be an instrumentality of the crime "alleged". It is clear that at the time the agents searched Petitioner's apartment, the only crime "alleged" in the warrant was possession of heroin (JA 19). Thus, regardless of boric acid's supposed relationship to the drug cocaine, at officers must have reasonably considered it as a diluent for heroin. Extensive hearings before the Select Committee on Crime into the heroin paraphernalia trade disclose that while numerous substances such as quinine, lactose, dextrose and mannite are commonly known as diluents among the law enforcement community, boric acid is not. *See Hearings pursuant to H. Res. 17 before the Select Committee on Crime, House of Representatives, at New York, N.Y. on June 25-30, 1970, and at Washington, D.C. on October 5-6, 1970,* 91st Cong., 2nd Sess.

Thus, by both the "reasonable belief" and the "crime alleged" elements of the trial court's test, the seizure in this case cannot be supported as a seizure of an instrumentality.

something other than a warrant. It has been and should be used to test warrantless seizures for reasonableness. In cases where the search and seizure justification is a warrant, however, the "plain view" rule is inappropriate. There the test for reasonableness is embodied in the probable cause and particularly requirements of the warrant, and any seizure which has not met those constitutional requirements cannot be said to have been authorized under the warrant whether it meets the plain-view rationale or not.

The confusion in this area began with *Harris* v. *United States,* 331 U.S. 145 (1947). In that case, FBI agents arrested Harris in his apartment on charges of mail fraud and transportation of a stolen check. While searching the apartment subsequent to the arrest and without a warrant, they came upon and seized a packet of stolen draft cards and later convicted Harris of possessing them. On appeal, the Court (5 to 4) held that the draft cards had been properly admitted into evidence since (1) they were property the possession of which was a crime, and (2) they were seized during a proper search incident to a lawful arrest. This holding would appear to have virtually no bearing on the instant case, since boric acid is clearly not property the possession of which is a crime, and the search in question was concededly not conducted "incident to an arrest". In the majority opinion in *Harris,* however, appeared a much misunderstood dictum:

> This court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to an arrest, and on the other hand, those objects which may validly be seized

> including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested may be effected, and property the possession of which is a crime. [331 U.S. at 154].

Any idea that this dictum may be said to stand for the proposition that the various categories of items listed may be seized under the authority of a warrant which does not particularly describe the item seized is negated by the statement on its face, and by the case history from which it arose. On its face, the statement concerned a distinction between items which could or could not be seized *with or without* a proper warrant. The distinction, commonly known as the "mere evidence" rule, was first enunciated in *Gouled* v. *United States*, 255 U.S. 298 (1921). This rule did not reach the question whether an item could be seized under the authority of a warrant if it had not been particularly described in the warrant.

The Court met that issue in *Marron* v. *United States*, 275 U.S. 192 (1927), combined with an "incident to arrest" issue such as was the basis of the *Harris* decision. In *Marron*, officers searching under a warrant to seize intoxicating liquor and articles for its manufacture seized a ledger and several utilities bills which were later used to convict Marron of conspiracy to violate the Prohibition Act. While holding that the seizure was authorized regardless of the warrant because it occurred incident to arrests taking place on the premises, the Court in no uncertain terms set forth its view as to what could be seized under the authority of a warrant:

> The requirement that warrants shall particularly describe the things to be seized makes gen-

> eral searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. [275 U.S. at 196.[18]]

A statement of relevant Fourth Amendment law after *Harris* would thus be that although mere evidence could never be seized, instrumentalities, fruits of crime and contraband could be seized under a properly particular warrant or where the search was otherwise authorized, such as by incidence to an arrest.

A further seizure justification had been suggested in *Harris.* This was the idea that an item the possession of which was itself a crime could be seized irrespective of whether it was described in a warrant or seized incident to an arrest. The rationale behind this justification was similar to the rationale behind the "mere evidence" rule of *Gouled,* which had been based on concepts of English property and forfeiture law. *See* Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law,* 49 Calif. L. Rev. 474, 475 (1961).

In *Warden* v. *Hayden,* 387 U.S. 294 (1967), the Court re-evaluated the "mere evidence" rule and de-

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[18] This oft-quoted passage from *Marron* was cited by Mr. Justice Frankfurter when he dissented in *Harris.* Although his dissent was based on his belief that warrantless searches should be limited in physical scope, he observed that the holding of the case had not affected *Marron:*

> But even if the search was reasonable, it does not follow that the seizure was lawful. If the agents had obtained a warrant to look for the cancelled checks, they would not be entitled to seize other items discovered in the process. [275 U.S. at 165.]

cided that the ancient common law property and forfeiture concepts upon which it was based no longer obtained in the field of Fourth Amendment law. The State, it said, could have as legitimate an interest in competent criminal evidence as it had in fruits and instrumentalities of crime. In *Warden,* the justification for the search was "hot pursuit", which was thereby added to "incidence to arrest" as an alternative to a properly issued warrant. Holding that under such circumstances "mere evidence" could be seized for use in a criminal prosecution, the Court noted that its ruling still fell within the Fourth Amendment's requirements.[19]

After *Warden* did away with the "mere evidence" rule, officers could seize any item of competent evidence *if* they met the other requirements of the Fourth Amendment—*i.e.,* probable cause and particularity in the case of warrants and reasonableness in the case of other search justifications. It is apparent that this change in the law had no bearing on the particularity requirement expressed in *Marron,* because it dealt with the question of what could be seized *with* a properly particular warrant or under some warrant alternative.

It is in this context that we come to *Coolidge* v. *New Hampshire.* There, where the seizure was made under

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[19] The Court said (387 U.S. at 309):

> The "mere evidence" limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment • • •.

the authority of an invalid warrant, the court dealt with several alternative rationales advanced to uphold the search independently of the warrant, one of which was that the automobile seized was an "instrumentality" of crime, and thus could be seized because it was in plain view. Mr. Justice Stewart, in a plurality opinion upon this particular issue, held that there was in fact a "plain view" rule implicit in the law of search and seizure—*i.e.,* that "under certain circumstances the police may seize evidence in plain view without a warrant" (403 U.S. at 465). In order for a seizure to be valid under the "plain view" rule, he said, (1) there must be a prior justification for the intrusion (the search), and (2) the seizure must be inadvertent. These elements may be seen as formalizations of the case law which had established (1) that no *search* would be considered valid which was neither authorized by warrant nor justified as reasonable by incidence to arrest, hot pursuit, consent, mobility or some other "exigent circumstance", and (2) that if the searching official had knowledge of the place to be searched and the thing to be seized, he must, in the absence of some emergency, obtain a warrant.

In *Coolidge,* the plurality opinion found that the seizure of the automobile in question did not satisfy the inadvertence requirement, since the police knew the car was there and intended to seize it all along. In Petitioner's case, the same lack of inadvertence exists. The officers undoubtedly suspected the presence of narcotics paraphernalia, intended to seize any they found, and could have gotten a warrant for it had they asked for one. Thus, the seizure in this case no more meets

the "inadvertence" requirement than did that in *Coolidge*.[20]

In summary, *Marron* established that in order for a seizure under the authority of a warrant to meet the particularity requirement of the Fourth Amendment, the item seized must be described in the warrant. Later cases have elaborated on which descriptions will be considered particular enough, and have established other rationales such as the "plain view" and "discovery of crime" tests to examine *warrantless* seizures. But no valid later rationale has arisen to support the

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[20] We very respectfully submit that one piece of dictum in Mr. Justice Stewart's opinion concerning the "plain view" rule is in error. He wrote:

> An example of the applicability of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. *Cf. Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 358 [1931]; *United States* v *Lefkowitz*, 285 U.S. 452, 465 [1932]; *Steele* v. *United States*, 267 U.S. 498 [1925]; *Stanley* v. *Georgia*, 394 U.S. 557, 571 [1969] (Stewart, J., concurring in result.) [403 U.S at 465.]

The cases cited do not support this statement. *Go-Bart* was based on the "mere evidence" rule as applied to an "incident to arrest" situation. It did not concern the issue of seizure under the authority of a warrant. *Lefkowitz* similarly concerned seizure incident to an arrest. *Steele* contradicts the proposition expressed in the dictum. There the seizure was upheld as being within the description in the warrant, and the Court was careful to distinguish situations where property seized was not described in the warrant.

seizure under the authority of a warrant of any item not particularily described therein.[21]

CONCLUSION

For each and all of the above reasons, Petitioner's conviction should be reversed.

Respectfully submitted,

E. BARRETT PRETTYMAN
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorney for Petitioner

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[21] The Second Circuit, on other occasions, has adopted this distinction. For example, in *United States* v. *LaVallee*, 391 F.2d 123 (2d Cir. 1968), the court recognized the basic difference between searches authorized by warrants and those authorized by other exigencies such as consent, hot pursuit, mobility of the area to be searched, and incidence to arrest. It also recognized the availability of alternative grounds for seizure such as the inherent illegality of contraband items.

Similarly, in *United States* v. *Dzialak*, 441 F.2d 212 (2d Cir. 1971), a search was conducted under the authority of a warrant which specified as items to be seized hosiery, a bicycle and a carton of binoculars. Actually seized were 21 watches, three opera glasses, two microscopes, and seven telescopes. With reasoning reminiscent of the limiting language in *La Vallee*, the court held that the term "binoculars" was broad enough to include the various optical items, but not the watches. Holding the seizure of the watches invalid under *Marron*, the court was called upon to respond to a Government argument, often brought in connection with particularity issues, that to reject the seizure of the watches would be to make the scope of searches with warrants narrower than the scope of searches without warrants. As the court recognized, there was no inconsistency in such a state of affairs, since the particularity requirement did not apply to warrantless searches. If there were any problem, it would be that the scope allowed warrantless searches had been too broad rather than that the scope allowed under warrants was too narrow.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 288, 328—September Term, 1972.

(Argued October 20, 1972 Decided November 30, 1972.)

Docket Nos. 72-1709, 72-2088

UNITED STATES OF AMERICA,

Appellee,

v.

VINCENT PACELLI and DEMETRIOS PAPADAKOS,

Appellants.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appeal from a judgment of conviction of Vincent Pacelli and Demetrios Papadakos on trial to the jury in the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* on charges of conspiracy to violate §§ 812 and 841 of Title 21 of the United States Code, and Pacelli also on substantive charges of violation of §§ 812, 841(a)(1), 841(b)(1)(A) and 846 of Title 21 of the United States Code and use of a telephone to facilitate a felony.

Affirmed.

E. Barrett Prettyman, Jr., Washington, D.C., *for Appellant Pacelli.*

Elliot A. Taikeff, New York, N.Y., *for Appellant Papadakos.*

John M. Walker, Jr., Asst. U.S. Attorney (Whitney North Seymour, Jr., U.S. Attorney for the Southern District of New York, Kenneth Feinberg and John W. Nields, Jr., Asst. U.S. Attorneys, of counsel), *for Appellee.*

Smith, *Circuit Judge*:

Appellants Vincent Pacelli and Demetrios Papadakos were found guilty after a jury trial in the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, of conspiring to distribute narcotic controlled substances in violation of 21 U.S.C. §§ 812, 841. Pacelli was also found guilty on three substantive counts of a five-count indictment.[1]

Appellants claim that Rule 4 of the Second Circuit's Rules Regarding the Prompt Disposition of Criminal Cases requires dismissal of the indictment and that admission of an out-of-court post-arrest statement of a government witness who disclaimed the statement in court denied them due process and violated the federal hearsay rules. Appellant Pacelli additionally claims that the admission of a quantity of boric acid into evidence violated his Fourth Amendment rights. Appellant Papadakos claims that indictment and trial in this case put him in jeopardy for a conspiracy to which he had already pleaded guilty. For the reasons given below, we find no merit in any of these contentions, and we affirm.

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[1] Counts III and IV charged him with distribution and possession with the intent to distribute heroin and cocaine; Count V charged use of communication facilities in the course of the heroin distribution.

On May 5, 1971, Agent John Lepore of the Bureau of Narcotics and Dangerous Drugs first met Elisa Possas, a trafficker in drugs and appellant Jimmy Papadakos' girlfriend. Possas gave Lepore cocaine to sample and procured for him a quantity of better quality. Possas assured Lepore that she could obtain pure heroin from her boyfriend and source, Papadakos. She refused, however, to introduce the agent to Papadakos until she knew him better and had completed the cocaine deal with him.

On May 20, Lepore again met Possas. She showed him a sample ½ kilo of heroin. They agreed upon a purchase price of $14,000.[2] That night Lepore met Possas ostensibly for a dinner date and to pay her for the heroin. When she indicated that Pacelli would not allow her to take Lepore to see him to complain about the quality of heroin sold to the agent, Lepore signaled other agents and Possas was arrested.

Warned of her rights, Possas was taken to the stationhouse where, according to the testimony of Agent Devine, she agreed to cooperate. She signed a statement which explained her rights and then gave a statement to the officers identifying Pacelli and Papadakos as her suppliers. The statement was typed by Agent Devine and represented a summary of her information. She initialed the changes she made in reading over the typed summary and signed

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[2] In response to Lepore's question about the source of the heroin, Possas said it came from "Vinnie the Italian." She did not know his last name but said that she had been invited to his wedding and could get his name from the wedding invitation. Possas explained that Vinnie and her boyfriend Papadakos were partners in a heroin distributing ring which supplied customers from Chicago and Detroit. Upon Lepore's request that she call Vinnie, Possas dialed a number registered to Beverly Jalaba, Vinnie's fiancee. She said, "Hello, Vinnie, this is Lisa. My man will take the half," and "Okay, I will see you later." Lepore called Possas at home later that day to get Vinnie's last name. Possas checked the invitation and told Lepore that it was Pacelli.

the statement. Possas and several agents then returned to her apartment to make a call to Pacelli. The call was answered by Jalaba who spoke with Possas about a wedding dress; Possas told the agents that "wedding dress" was a code word for heroin.

Several hours later, agents went to Jalaba's apartment to arrest Pacelli. Those in the apartment initially refused to open the door upon the agents' announcement of their arrival and purpose. After a few minutes, during which time the officers heard the rattle of the venetian blinds and a toilet flushing, the door was finally opened. Pacelli was placed under arrest and warned of his rights. An agent outside the building saw a package thrown from the apartment window. He reported to the arresting officer who, after seeing the package which contained four bags of cocaine, placed Jalaba under arrest and warned her of her rights. Later that afternoon the apartment was searched for heroin pursuant to a search warrant. Among the items seized was a container of boric acid found in a shopping bag in the kitchen which contained 30-40 other tins of the acid.

Papadakos was arrested on May 27, 1971.

At trial, the government called Elisa Possas, who had pleaded guilty to Counts I, II, III and V of the indictment. She denied knowing Pacelli, denied that either Pacelli or Papadakos was her source, and repudiated the statement given to the police, claiming that she signed it thinking it to be deportation papers. She testified that while at the stationhouse she was high on drugs, that she was terribly upset and talking wildly. The government then introduced the content of the statement through the testimony of Agent Devine.

After the government's case, the court dismissed the charge against defendant Jalaba for lack of evidence. The jury returned a verdict of guilty against Pacelli on Counts

I, III, IV and V, and innocent on Count II which charged distribution of cocaine to West, a government informer on May 3. Papadakos was found guilty on the conspiracy count and acquitted on substantive Count III.

The government filed its notice of readiness on November 12, nine days before the six-month period allowed under the Second Circuit's Rules Regarding the Prompt Disposition of Criminal Cases expired, requesting ten days notice of trial date. The court correctly held that the speedy trial rules were not violated, since the government had timely declared its readiness and the ten-day notice requested by the government was not binding on the court. The court could have called the parties to trial without the ten-day notice.

The admission of Possas' post-arrest statement was not reversible error. Appellants make no claim that its admission violated their Sixth Amendment right to confront witnesses against them, since Possas was on the stand ready to testify. *California* v. *Green*, 399 U.S. 149, 158-159 (1970). Nor was there any violation of due process in admitting Possas' unsworn statement into evidence. As in *Green, supra*, breach of the evidentiary hearsay rule did not result in a *per se* violation of due process. There was substantially identical evidence in the record here to support appellants' conviction. The essence of the post-arrest statement was introduced through Agent Lepore's testimony concerning Possas' statement made to him during the conspiracy. Possas' telephone call to a number registered to Pacelli's financee with whom Pacelli was living, the statement of Possas to Pacelli that her man wanted the "stuff" was some evidence connecting Pacelli with the conspiracy. Evidence of the drugs seized at the time of appellant's arrest and the subsequent search of Jalaba's apartment furnished additional support for the statements made concerning Pacelli's involvement in the narcotics business.

Failure to prove infringement of his constitutional rights, however, does not of itself dispose of Pacelli's claim.

Violation of the hearsay rule, if prejudicial, might also support reversal. Admission of Possas' statement without instructions to the jury limiting its use to the issue of credibility violated the hearsay rule as applied in this circuit.[3]

The statement might properly have been admitted for a limited purpose; Possas failed not only to help the prosecution but testified against the government's case. In the face of her testimony that she neither knew the defendant nor received drugs from him, the government could use her prior statement to impeach her as a witness. *Taylor* v. *Baltimore & Ohio R.R.*, 344 F.2d 281, 283-84 (2d Cir.), *cert. denied*, 382 U.S. 831 (1965). The permissible effect was merely to cancel out the unexpected contradictory testimony made on the stand. Error therefore was made not in the admission of the statement but in the court's failure to give proper limiting instructions.

Review of the record, however, leads us to conclude that the error in this case was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 19, 26 (1967). Agent Lepore had already testified as to the substance of the statement incriminating the appellant made by Possas prior to Possas' arrest; these statements made in furtherance of the conspiracy could be used substantively against the defendant. The court was quite correct in thinking futile and unnecessary an attempt to erase from the jury's mental slate one of two substantially identical pictures. Moreover, the telephone call to Pacelli and the drugs found in Jalaba's apartment all strongly support conviction.[4]

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[3] This court expressly refused only last term to anticipate the proposed Federal Rules of Evidence (801d) or to expand its exception to the hearsay rule enunciated in *Desisto* as the government again asks us to do. *United States* v. *Briggs*, 457 F.2d 908, 910 (2d Cir. 1972); *United States* v. *Cunningham*, 446 F.2d 194, 198 (2d Cir), *cert. denied*, 404 U.S. 950 (1971).

[4] Appellant Papadakos adopted the arguments advanced on this issue by Pacelli. Our ruling as to Pacelli apply as well to Papadakos.

Relying on *United States* v. *Dzialak,* 441 F.2d 212 (2d Cir.), *cert. denied,* 404 U.S. 883 (1971) and *United States* v. *LaVallee,* 391 F.2d 123 (2d Cir. 1968), appellant Pacelli argues that seizure of boric acid, a diluent for cocaine, under a search warrant specifying only heroin, was violative of his Fourth Amendment rights. Appellant misconceives the import of the Supreme Court's decision in *Coolidge* v. *New Hampshire,* 403 U.S. 43 (1971). Both the majority and dissenters found that where a police officer has a warrant to search a given area for specified objects, and in the course of the search comes across some other article of incriminating character, the property is seizable under the plain-view doctrine. 403 U.S. at 465, 514-516.

The determinative factor in all plain-view seizures is "that the police officer . . . had a prior justification for an intrusion in the course of which he came *inadvertently* across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure." *Coolidge, supra,* at 446 (emphasis supplied). Seizure of mere evidence as well as instrumentalities or contraband is justified under the doctrine. *Coolidge, supra,* at 464. In the case at bar narcotics agents entered appellant's fiancee's apartment under the authority of a properly executed search warrant. The warrant specified the ½ kilo of heroin Possas had informed Lepore would be there. While searching for the heroin which was not found, the officers came upon 30-40 tin containers of boric acid, a diluent of cocaine, in a shopping bag in the kitchen. The agents had entered looking for heroin; they found a large quantity of boric acid—incriminating evidence of illegal drug activity. There is no evidence to show prior knowledge of the boric acid or its location, nor of any intent to

seize such evidence prior to its being found. Under *Coolidge* the search was reasonable.[5] The boric acid, seized in a search for heroin, was obviously relevant evidence of a closely related drug activity and properly subject to seizure, especially in light of the cocaine found at the scene of the arrest earlier that morning.

A more than four-hour ransacking search of appellant's apartment for any possible incriminating evidence required reversal of *United States* v. *Dzialak*, 441 F.2d 212 (2d Cir. 1971). Police in that case had a search warrant for 27½ pairs of hosiery, a bicycle and a carton of binoculars, items believed to have been stolen. They seized a bike, five boxes of hosiery, twelve pieces of telescope equipment, twenty-one Timex watches and five shipping papers to the watches. While finding that the optical equipment was sufficiently covered by "binoculars" in the warrant, the court held that the Timex watches were the fruit of a general search proscribed by the Fourth Amendment. 441 F.2d at 216-217. There is no evidence of such a ransacking general search

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[5] Nor are our decisions in *LaVallee* and *Dzialak* to the contrary. The question of the constitutionality of seizure of unspecified property unexpectedly discovered in the course of a lawful search which is reasonably related to the purpose of the search was expressly left open in *United States* v. *LaVallee*, 391 F.2d at 127. In that case, newspaper clippings concerning burglaries were seized under authority of a warrant to search for various machines and paraphernalia used by a licensed locksmith which property was in violation of § 408 of the Penal Law. Reversing the conviction, the court focused on the nature of the evidence seized, observing that "[t]here is no evidence that anything which was mentioned in the newspaper clippings concerned anything said or done by [defendant]; and they were certainly not contraband which would show that another, different offense was being committed in the presence of the police. . . The clippings are at best of dubious evidential value and, standing by themselves, would be a highly questionable subject for issuance of a search warrant." 391 F.2d at 127.

of Jalaba's apartment; the boric acid was found in a shopping bag in plain view in the kitchen.[6]

As the evidence seized was material and incriminating, and found in plain view within the scope of a limited search for heroin under authority of a properly executed search warrant its seizure was reasonable and its admission into evidence proper.

Appellant Papadakos raises his earlier plea to a second indictment before Judge Gurfein as a bar to prosecution under the indictment in this case, claiming that the same crime is the subject of both indictments. The earlier indictment, the one now at issue, charged appellant with conspiracy to possess for distribution and distribution of narcotic substances; violation of the same law, §§ 812 and 841 of Title 21 of the United States Code, was charged in the second indictment. Appellant relies on the identity of the offense charged and an overlap of seventeen days in the two charged conspiracies to show that the agreements were not separate and distinct but rather one overall conspiracy. Offenses for the purposes of double jeopardy must be the same in law and in fact. *Dryden* v. *United States,* 403 F.2d 1008, 1009 (5th Cir. 1968). They were not the same here. Although the times alleged in the indict-

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[6] Both *United States* v. *LaVallee* and *United States* v. *Dzialak* cite *Marron* v. *United States,* 275 U.S. 192 (1927) for the proposition that items not specified in a search warrant may not be seized under its authority.

The Supreme Court's decision in *Coolidge* casts doubt upon the continuing validity of such reliance. In his dissent, Justice White observes, "I have my doubts that ... *Marron* can survive later cases in this Court.... Apparently the majority agrees, for it lumps plain-sight seizures in such circumstances along with other situations where seizures are made after a legal entry." 403 U.S. at 515. The majority, however, while allowing seizures of unspecified objects pursuant to a warrant, apparently does not consider *Marron* overruled. The Court uses *Marron's* result upholding the seizure of ledgers not specified in a search warrant as an example of its inadvertence rule.

ment here overlapped, the facts proved occurred in two separable periods, three months apart.

Offenses are not the same merely because they arise out of the same general course of criminal conduct; "they are the 'same' only when 'the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other.'" *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961). While the two indictments charged the same type of crime, the only common conspirator was the appellant, moreover the overt acts charged in each indictment were entirely different, some indication of lack of identity.[7]

Appellant urges that the proper test is that used in *Short* v. *United States*, 91 F.2d 614, 621 (4th Cir. 1937), in which the court rejected reliance on overt acts alleged and focused instead on whether it appeared that the government had merely carved one larger conspiracy into smaller, separate agreements. Even on this test, however, the record clearly demonstrates that this was not the case here. Arrest and charges under the first indictment were made before the actions alleged in the second indictment even took place. There is nothing indicating any connection between the parties or agreements of the May and August transactions. At the time of his plea, appellant himself did not consider the offenses the same under the two indictments, pleading guilty to those crimes charged in the second but steadfastly maintaining his innocence as to those in the first. The court did not err in its refusal to grant an evidentiary hearing on Papadakos' claim of double jeopardy.

Appellant Pacelli's challenge to the admission of his statement of ownership of the cocaine thrown from Jalaba's window on the grounds that he was not informed of his right to the presence of an attorney, is answered by

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[7] Compare, *Ferracone* v. *United States*, 29 F.2d 691, 692 (7th Cir. 1928); *Henry* v. *United States*, 15 F.2d 365 (1st Cir. 1926)

this court's decision in *United States* v. *Lamia*, 429 F.2d 373, 377 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970). The arresting officer warned Pacelli that he had a right to remain silent, that he did not have to make any statements to the officer, that he had a right to an attorney and that if he couldn't afford one the court would appoint an attorney for him. The instructions fully informed appellant of his rights.

Judgment affirmed.

APPENDIX B

JA 17

Government's Exhibit 9

STATEMENT OF RIGHTS AND WAIVER	UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF NARCOTICS AND DANGEROUS DRUGS	DATE 5/20/71

PLACE 90 Church Street, New York, New York

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court or other proceedings. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. In such a case you have a right to have a court-appointed attorney present at the interrogation. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

You may waive the right to advice of counsel and your right to remain silent and answer questions or make a statement without consulting a lawyer if you so desire.

WAIVER

I [X] have read [ ] had read to me the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me. I was taken into custody at (time) 12:00 [ ] A.M. [X] P.M., on (date) 5-20-71, and have signed this document at (time) 11:30 [ ] A.M. [X] P.M., on (date) 5-20-71.

WITNESS: Thomas F. Glavin, E. Jarbo King

SIGNATURE OF PERSON WAIVING RIGHTS: Elsia Maria C. Rosas

FORM DEA/BND FORM 13 (5/68) SUPERSEDES FORM FD-395B (10-66) WHICH IS OBSOLETE

APPENDIX C

JA 18

Government's Exhibit 9A

STATEMENT OF ELISA MARIA C. POSSAS GIVEN TO SPECIAL AGENTS THOMAS J. DEVINE AND E. JAMES KING III AT THE OFFICE OF THE BNDD, 90 CHURCH STREET, NEW YORK ON MAY 20,1971. THE FOLLOWING STATEMENT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. NO THREATS, FORCE, OR PROMISES OF REWARDS HAVE BEEN MADE TO ME AND THIS STATEMENT IS FREELY AND VOLUNTARILY GIVEN.

On May 20,1971 I was arrested by Federal Agents after I delivered a half kilogram of heroin to an undercover agent. The heroin that I gave to the agent had been hidden in the apartment of my girlfriend, Pat PARKS without her knowledge for about five days. On about May 15,1971 my boyfriend Jimmy PAPADAKOS told me that I would recieve a key to a subway locker with written instructions on exactly where the locker and the heroin was located. Someone put these instructions and a key under my apartment door and on the same day I went to the 14th Street subway and picked up a half kiolgram of heroin from a locker.

A few days later I went to Vinnie PACELLI and told him that I had picked up his package. I told him that I knew that he was the one that had put the heroin in the locker in the 14th Street subaway and he told me that I was correct and that the half kilogram of heroin belonged to him. I then told Vinnie that I wanted to sell this heroin to my own customer without Jimmy PAPADAKOS knowing about the sale. I asked Vinnie if he could replace the heroin that I sold to my customer before Jimmy PAPADAKOS found out that it was missing. Vinnie PACELLI told me that he would give me another half kilo of heroin in exchange for $11,000.00 after I sold the first half kilogram.

E.P. After I gave the heroin to the agent I then went to VinniePACELLI's house at 300 West 40th Street apartment #27-S, New York. I then told Vinnie that I had given his package to my customer and that I would recieve the money by 9:00pm that night. (May 20,1971). Vinnie told me that he would stop at my apartment later in the night to see if I had recieved my money and if so, he would take the $11,000 that I owed him for his apckage. He also told me that if I had the money , he would then go and get another half kilogram of heroin to replace the one that I sold. After I was arrested I tried to get in touch with Vinnie but I could not locate him. I called several places that I know he frequents but I was still unable to reach him.

E.P. I met Jimmy PAPADAKOS about two years ago here in New York. I started to live with him in [illegible] apartment and shortly afterward he taught me the business of dealing in cocaine and heroin. I sold $100.00 "spoons" of cocaine for Jimmy [illegible] in several clubs and taverns throughout New York City. I also delivered cocaine in ounce and four ounce quantities and on accassion I delivered some quarter kilograms of cocaine to some of Jimmy's customers.

Vinnie PACELLI was Jimmy PAPADAKOS' connection for all of the heroin and cocain that Jimmy supplied to his customers. In addition, JIMMY PAPADAKOS would deliver cocaine and heroin to most of the customers that VINNIE PACELLI sold his narcotics.

WITNESSED BY Thomas J. Devine 5/20/71
E. James King III

Elisa Maria C. Possas
ELISA MARIA C. POSSAS